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No. 138

In the Supreme Court of the United States

OCTOBER TERM, 1932

JOSEPH F. MILLER, PETITIONER

v.

A. C. ADERHOLD, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINION BELOW

No opinion was rendered by the District Court. The *per curiam* opinion of the Circuit Court of Appeals (R. 7) is reported in 56 F. (2d) 152.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 20, 1932. (R. 8.) A petition for

rehearing was denied March 11, 1932. (R. 10.) The petition for certiorari was filed June 6, 1932, and was granted December 5, 1932. (R. 11.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the suspension of the imposition of sentence upon the petitioner was invalid.

2. If so, whether sentence was improperly imposed at a later term.

STATUTE INVOLVED

The Federal Probation Act of March 4, 1925, c. 521, 43 Stat. 1259, as amended by the Act of June 6, 1930, c. 406, 46 Stat. 503 (U. S. C., Title 18, Secs. 724–725; U. S. C. Sup. V, Title 18, Secs. 726–728), is printed in full in the appendix to petitioner's brief.

STATEMENT

On or about November 12, 1931, the petitioner herein filed in the United States District Court for the Northern District of Georgia a petition for a writ of *habeas corpus* which alleged that he was being unlawfully detained in the Atlanta Penitentiary under a commitment issued by the United States District Court for the Southern District of New York, for the reason that that court was without jurisdiction to impose the sentence upon which the commitment was based. He prayed a discharge from imprisonment if it should be found that his detention was illegal. (R. 1–2.) The writ issued (R. 4), and the warden of

the penitentiary responded by justifying petitioner's detention under the commitment aforesaid (R. 4). After a hearing the writ was dismissed and the petitioner remanded to the custody of the warden. (R. 4.) Upon an appeal to the Circuit Court of Appeals for the Fifth Circuit, which was prosecuted *in forma pauperis*, the judgment of the District Court was affirmed. (R. 7–8.)

The only facts recited in the petition for *habeas corpus* as the basis of petitioner's attack upon the commitment are the following:

On August 27, 1928, petitioner was indicted in the United States District Court for the Southern District of New York upon the charge of stealing from the United States mails.[1] On December 10, 1930,[2] the petitioner was arraigned and pleaded guilty, whereupon sentence was suspended and the petitioner ordered discharged from the custody of the marshal. On June 17, 1931, another judge sentenced petitioner to four years in the Atlanta Penitentiary. A motion to vacate this sentence, made on October 27, 1931, was denied. No appeal was taken from the denial of this motion. (R. 1–2.)

The allegations of the petition were not denied by the warden in his response.

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[1] This offense is made punishable by Section 194 of the Criminal Code, as amended (U. S. C., Title 18, Sec. 317), which prescribes as a penalty a fine of $2,000 or imprisonment for not more than five years, or both.

[2] Erroneously stated in the petition for *habeas corpus* as September 10, 1930. (See R. 2, 3.)

The order of December 10, 1930,[3] suspending the imposition of sentence, a copy of which was attached to the petition for *habeas corpus* as Exhibit A, reads as follows (R. 2):

> Deft. pleads guilty; sentence suspended.
> Ordered that the prisoner be discharged from the custody of the U. S. marshal.

This order was entered by the District Court at its December Term, 1930.[4] The docket entries made in connection with this order were as follows (R. 3):

> Dec. 10, 1930. Pleads guilty; sentence suspd. Coleman, J.
>
> * * * * *
>
> Dec. 15, 1930. Filed discharge from custody of U. S. Marshal.

The judgment and commitment of June 17, 1931,[5] a copy of which was attached to the petition for *habeas corpus* as Exhibit B, was entered during the June, 1931, Term of the District Court. It read (R. 3):

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[3] While this document, like the judgment and commitment of June 17, 1931, is designated as an "extract from the minutes," we are advised that under the practice obtaining in the Southern District of New York such documents are considered as the orders of the court.

[4] Terms of the District Court for the Southern District of New York are held at New York City on the first Tuesday in each month and are extended for ninety days under standing rule. See Judicial Code, Sec. 97, as amended (U. S. C., Title 28, Sec. 178); General Rule 6 of the United States District Court for the Southern District of New York.

[5] See footnote 3, *supra*.

> On motion of the United States attorney, ordered sentenced.
>
> The court thereupon proceeded to pass judgment, and sentenced the prisoner to be imprisoned for a term of four (4) years. Sentence to be executed at the U. S. penitentiary, Atlanta, Ga. Sentenced to date from June 17, 1931.

The docket entries made in connection with this judgment are as follows (R. 3):

> June 17, 1931 P. G.[6]; sentenced to four years U. S. penitentiary, Atlanta, Ga., Goddard, J.

A certified copy of the entire transcript of record in the criminal proceeding has been obtained from the Clerk of the United States District Court for the Southern District of New York and has been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

I

If the suspension of imposition of sentence was valid, the District Court concededly had jurisdiction to impose sentence after the expiration of the term.

Prior to the Federal Probation Act of March 4, 1925, Federal courts, while without power indefinitely and permanently to suspend the imposition of sentence (*Ex parte United States*, 242 U. S. 27), could

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[6] The purpose of this second reference to a plea of guilty was undoubtedly to identify the sentence with petitioner's plea of December 10, 1930.

lawfully defer imposing sentence temporarily for any purpose reasonably incident to the administration of justice and the imposition of the sentence, such as to afford opportunity for the consideration of motions for a new trial or in arrest of judgment, or to enable the judge to satisfy his own mind as to what the punishment should be. While the imposition of sentence in the case at bar was not postponed to a definite date in the future, it does not affirmatively appear that the District Judge intended the suspension to be permanent or to operate as a reprieve or pardon. Once the jurisdiction of a Federal court has attached, every presumption must be indulged in favor of the rightful exercise thereof until the contrary is affirmatively established. So far as disclosed by the record, the trial judge may have deferred sentence temporarily for the purpose of obtaining information which he deemed essential for the imposition of sentence. In the absence of facts explaining the character of the suspension and in the absence of an affirmative showing by petitioner that the suspension was intended to be indefinite and permanent, it will be presumed to have been for a lawful purpose, and therefore valid.

Even if invalid under the law as it stood prior to the Probation Act, the suspension was valid under that Act, which expressly gave the trial court power to suspend the imposition or execution of sentence and to place the defendant upon probation. Assuming that the Act does not authorize a suspension of sentence without a simultaneous grant of probation,

it does not affirmatively appear from the record that at the time of the suspension of sentence the petitioner was *not placed upon probation*. In the absence of an *affirmative* showing to the contrary, this Court should presume the facts to be such as would make the order of suspension valid rather than invalid.

Moreover, certain provisions in the Probation Act indicate that there may be a suspension of sentence under that Act which is not necessarily connected with a formal probation. It has been held that a general, indefinite suspension of sentence, without a grant of probation, is within the power of a District Judge under that statute. Even if an order suspending sentence under the Probation Act should properly contain a reference to a stated period and terms of probation, the authorities indicate that the effect of a suspension of sentence for an indefinite period, where nothing appears as to the purpose of the suppension, is automatically to place the defendent upon probation for such time, not exceeding the statutory limitation of five years, as the court shall remain satisfied that the ends of justice are being subserved thereby.

II

Assuming the suspension of sentence to have been void, the sentence could lawfully be imposed at a subsequent term. This Court has held that in the absence of a statute providing otherwise the Federal courts upon the conviction of a defendant have no discretion but to impose the penalty provided by

law. The judge may suspend imposition of sentence temporarily for a purpose incident to the imposition thereof, or he may suspend it for a definite period or indefinitely under the Probation Act, but if he does neither of these things the duty remains to enforce the penalty provided by law. Since, under *Ex parte United States, supra*, he can be compelled to do this, he may do it voluntarily.

No difficulty arises from the fact that the sentence in the case at bar was imposed at a term subsequent to the one in which it was, it is alleged, invalidly suspended. Until a final order or judgment has been entered the trial court retains jurisdiction over the case from term to term without a formal order of continuance. In a criminal case the final judgment is the sentence, and in such case the court does not lose jurisdiction until the entry of a valid sentence. An order suspending the imposition of sentence is not the sentence, nor is it a final, appealable order. If, as petitioner contends, the order suspending the imposition of sentence in the case at bar was void, no final order was entered in the petitioner's case until the entry of the sentence for which he stands committed. Accordingly, sentence was imposed at a time when the trial court had jurisdiction to impose it.

This conclusion is supported by many authorities. Those cases which hold to the contrary are indefensible and are opposed to principles frequently announced and applied by this Court.

ARGUMENT

I

THE ORDER SUSPENDING THE IMPOSITION OF SENTENCE WAS VALID

If the order of the trial court of December 10, 1930, suspending the imposition of sentence (R. 2), was valid, it is clear that the court retained jurisdiction to impose sentence, within any reasonable time, at a later term.[7] *Miner* v. *United States*, 244 Fed. 422, 424 (C. C. A. 3d). The petitioner does not contend otherwise.

But the petitioner asserts that the suspension of the imposition of sentence was invalid because it was "an indefinite or permanent suspension." He argues that prior to the Federal Probation Act of March 4, 1925, which appears in full in the appendix to the petitioner's brief, the suspension of sentence would have been void under the so-called *Killits case* (*Ex parte United States*, 242 U. S. 27), and that under the Federal Probation Act the order of suspension cannot be sustained because, so he says, the District Judge did not place the petitioner upon probation for a fixed period and upon specific conditions as, he asserts, is contemplated by that statute. The Government contends that the suspension of the imposition of sentence was valid either apart from or under the Probation Act.

[7] Those courts which uphold the validity of an indefinite, permanent suspension of sentence uniformly recognize the power of the trial court to impose sentence at a subsequent term. See footnote 18, p. 28, *infra*.

A. THE SUSPENSION OF SENTENCE APART FROM THE FEDERAL PROBATION ACT

Ex parte United States, supra, does not establish that a United States District Judge is without power to suspend the imposition of sentence. In that case, after sentence had been imposed, the trial judge had ordered

> that the execution of the sentence be * * * suspended during the good behavior of the [defendant].

Thereafter, by original petition in this Court, the Government sought a writ of mandamus to compel the trial judge to eliminate, as void, that part of the order by which the judge attempted to suspend the execution of the sentence. In stating the question before it for decision, this Court said (242 U. S. 27, 40):

> The argument on behalf of the respondent [the trial judge] concedes that the order of suspension was *permanent* and *absolutely removed* the accused from the operation of the punishment provided by the statute; and it is further conceded that a suspension of this character was the equivalent of an *absolute and permanent* refusal to impose under the statute any sentence whatever. (Italics ours.)

The Court held that the portion of the order attacked was void as beyond the power of the trial judge, and granted the writ. With reference to the contention "that the right to refuse to impose a sentence fixed by statute or to refuse to execute such a sentence when imposed, is a discretion inhering in the judicial

power," the Court said (p. 42) that such contention was unfounded "since it must rest upon the proposition that the power to enforce begets inherently a discretion to *permanently* refuse to do so." The Court further said that "the plain legislative command fixing a specific punishment for crime" was not "subject to be *permanently* set aside by an implied judicial power upon considerations extraneous to the legality of the conviction." (Italics ours.)

Clearly the holding of the Court in the *Killits case* was that a Federal judge has no power, apart from a statute, to suspend the enforcement of a criminal statute (which, we assume, applies to the *imposition* as well as to the *execution* of a sentence) *permanently*, i. e., that he is without authority to exempt the convict permanently from the punishment provided by the statute.[8] The Court expressly recognized the power of the trial court temporarily to suspend the imposition of sentence when done for a purpose necessary in the administration of justice or incident to the imposition of the sentence, such as "to give opportunity for a motion for a new trial or in arrest, or to enable the judge to better satisfy his own mind what the punishment ought to be" (242 U. S. 27, 44, 46). This power has since been frequently exercised and approved.

In numerous cases the Federal courts have sustained the validity of suspensions (sometimes re-

[8] See the comment of the Court on the *Killits case* in *Ex parte United States*, No. 19, Original, decided December 5, 1932.

peated suspensions) of the imposition of sentence, for varying purposes, to a fixed future date or term of court. *Miner* v. *United States*, 244 Fed. 422, 424 (C. C. A. 3d), *supra*; *Ormsby* v. *United States*, 273 Fed. 977, 984 (C. C. A. 6th); *Gillespie* v. *Walker*, 296 Fed. 330, 332 (C. C. A. 4th); *Musick* v. *United States*, 2 F. (2d) 711 (C. C. A. 3d); *King* v. *United States*, 25 F. (2d) 242, 244 (C. C. A. 6th); *Ex parte Dellan*, 26 F. (2d) 243, 244 (C. C. A. 9th); *Caldwell* v. *United States*, 36 F. (2d) 738, 740 (C. C. A. 10th), certiorari denied, 281 U. S. 725. In the *Miner*, *Musick*, and *Dellan cases* it did not appear from the record in the trial court for what reason or purpose the suspensions were granted. In at least one case, *Taylor* v. *Walker*, 6 F. (2d) 577 (C. C. A. 4th), the court sustained a sentence imposed, apparently, at a term subsequent to that in which the trial judge had merely suspended the sentence generally, without taking any action as to bail, confinement, or continuance of the case.[9]

Although in the case at bar the suspension was not to a stated term or date in the future, it does not affirmatively appear that the district judge intended the suspension of sentence to be permanent or to

[9] The defendant had pleaded guilty on April 17, 1924, at the April term of the United States District Court for the Southern District of West Virginia, at Charleston, whereupon, according to the clerk's minutes, the judge took time to consider his judgment. On December 3, 1924, at the November Term (U. S. C., Title 28, Sec. 194), the defendant was arrested on a capias and sentenced.

operate as a reprieve or pardon. The order of December 10, 1930, so far as the record discloses, merely shows (R. 2):

> Deft. pleads guilty; sentence suspended.
>
> Ordered that the prisoner be discharged from the custody of the U. S. marshal.[10]

No further facts with reference to the suspension of sentence, or the reasons therefor, appear either in the record in this case or in the certified transcript of the record in the District Court for the Southern District of New York. What was said orally by the trial judge at the time of the suspension does not appear. No allegations as to the purpose of the order of suspension may be found in the petition for a writ of *habeas corpus*. (R. 1–2.) Whatever was done was apparently with the full consent of petitioner. So far as the record discloses the judge may well have deferred the imposition of sentence only temporarily for the purpose of securing further data which he deemed requisite to the imposition of the sentence. If the suspension were for that purpose, or for any other purpose reasonably necessary in the administration of justice, it would, as the cases above cited

[10] This order (R. 2) was on a printed form, as shown by the photostatic copy thereof appearing in petitioner's brief. The words "Ordered that the prisoner be discharged from the custody of the U. S. marshal" were part of the printed form. The words "Deft. pleads guilty; sentence suspended" were apparently placed upon the form by a rubber stamp.

show, clearly have been valid.[11] In the absence of facts explaining the reason for the suspension of sentence,[12] and in the absence of an affirmative showing that the trial judge intended the suspension to be absolute and permanent, we submit that this Court should presume the facts to have been such as would make the action of the judge valid rather than invalid.

Few presumptions are more firmly established than that as to the regularity and correctness of judicial action and procedure. *Lewis* v. *United States*, 279 U. S. 63, 73; *Nofire* v. *United States*, 164 U. S. 657, 660–661; *Rouda* v. *United States*, 10 F. (2d) 916, 918 (C. C. A. 2d); *Steers* v. *United States*, 192 Fed. 1, 4 (C. C. A. 6th). This is particularly true where the judicial proceedings are attacked collaterally by *habeas corpus*. *United States* v. *Pridgeon*, 153 U. S. 48, 59, 62–63; *Archer* v. *Heath*, 30 F. (2d) 932, 933 (C. C. A. 9th). In the *Pridgeon case* this Court said:

> Under a writ of *habeas corpus* the inquiry is addressed * * * to the question whether

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[11] Where, due to error of the clerk or other official, the records of the court do not correctly reflect the actual facts or order of the trial judge, the court possesses the power at any time to correct its records. *United States* v. *Mayer*, 235 U. S. 55, 67; *Rupinski* v. *United States* 4 F. (2d) 17, 18 (C. C. A. 6th). *United States ex rel Campbell* v. *Bishop*, 47 F. (2d) 95, 96 (C. C. A. 5th).

[12] The fact that petitioner was discharged from the custody of the Marshal is relied upon by the petitioner as indicating that the suspension was permanent. But numerous reasons may have existed which made it unnecessary for the petitioner to be held in custody, especially if he were placed on probation. See pp. 20–21, *infra*.

> the proceedings and the judgment rendered therein are, *for any reason*, nullities, and *unless it is affirmatively shown* that the judgment or sentence, under which the petitioner is confined, is void, he is not entitled to his discharge. (Italics ours.)

Although Federal courts are courts of limited jurisdiction, as to which there is no general presumption of jurisdiction as in the case of courts of general jurisdiction, nevertheless it is settled beyond dispute that once the jurisdiction of a court of limited jurisdiction has attached, every presumption must be indulged in favor of the rightful exercise thereof *until the contrary is affirmatively established.* And where, in a criminal proceeding, jurisdiction is once established, the presumption is that it continues, and the burden is *on the defendant* to show that the court lost jurisdiction to pronounce judgment. *Miller* v. *United States*, 11 Wall. 268, 299; *Harris* v. *Nixon*, 27 App. D. C. 94, 98–99, certiorari denied, 201 U. S. 645; *Stockslager* v. *United States*, 116 Fed. 590, 599 (C. C. A. 9th); *Stuckey* v. *State*, 288 Pac. 394, 395 (Okla. Cr.). See also *In re Cooper*, 143 U. S. 472, 506; *Lamp Chimney Co.* v. *Brass & Copper Co.*, 91 U. S. 656, 661; *State* v. *Taylor*, 188 Mo. App. 271, 272.

In the case at bar the trial court unquestionably had jurisdiction on December 10, 1930, to impose sentence. If the suspension of sentence on that date was only temporarily for a proper purpose it was valid. In the absence of any showing by petitioner to the contrary, it will be presumed that the

suspension was for a proper purpose and that it was valid. *Harris* v. *Nixon*, 27 App. D. C. 94, 98–99, certiorari denied, 201 U. S. 645; *Miner* v. *United States*, 244 Fed. 422, 424 (C. C. A. 3d), *supra; Gillespie* v. *Walker*, 296 Fed. 330, 333 (C. C. A. 4th), *supra; Musick* v. *United States*, 2 F. (2d) 711, 712 (C. C. A. 3d), *supra; Ex parte Dellan*, 26 F. (2d) 243, 244 (C. C. A. 9th), *supra; Brickey* v. *State*, 148 Ark. 595, 599; *People* v. *Penn*, 302 Ill. 488, 495; *State* v. *Cotterel*, 12 Idaho 572; *State* v. *Friedman*, 98 N. J. L. 577, 579; *Dalton* v. *State*, 6 Okla. Cr. 368.

In the *Miner case, supra*, the court said (p. 424):

> Nor does the court's purpose appear. But every legal intendment favors the notion that it had a purpose and that the purpose was lawful. In fact, we must assume, in the absence of anything in the record to the contrary, that the postponements were made for a lawful purpose in the orderly progress of the case. This being true, the validity of the orders postponing sentence is established, leaving for decision no question of the court's jurisdiction to impose sentence at a later term.

The petitioner seeks to distinguish certain of the cases just above cited on the ground that in those cases the suspensions of sentence, although granted for reasons or upon conditions unknown, were to a definite term or date in the future (the suspensions in the *Brickey, Cotterel, Friedman*, and *Dalton cases, supra*, were indefinite as to time), and he states (Br. p. 9):

> If the record shows that the postponement was in terms to a definite time, it will clearly be presumed that the judge had proper reasons therefor. But * * * when the record shows that the suspension was by its terms indefinite, no presumption can change the record fact.

This assertion, unaccompanied by argument in its support, illustrates clearly petitioner's misconception of the *Killits case*. The test of validity of a suspension of sentence as enunciated in that case is not whether the suspension is to a definite time or term,[13] but whether it is permanent or absolute; i. e., whether it amounts to "an absolute and permanent refusal to impose * * * any sentence whatever." Accordingly, a suspension of imposition of sentence is not invalid merely because the postponement is not to a definite date. And conversely, a suspension of sentence beyond the term even if to a definite date is invalid if it is for an improper purpose. *State* v. *Sapp*, 87 Kan. 740, 744; *People* v. *Penn*. 302 Ill. 488, 494–495, *supra*. As the court in the latter case said (pp. 494–495):

> Whether a postponement is rightful depends not upon its length or definiteness, nor upon whether it extends beyond the term, but upon its purpose and character.

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[13] There, as a matter of fact, the suspension was for a definite time since the case was expressly kept open for five years. The Court consistently used the word "permanent" in referring to the type of suspension held to be beyond the power of Federal judges; at no place in its opinion did the Court describe such suspension as an "indefinite" suspension.

The fact that the suspension is not to a definite date is important only because it may be evidence, when considered with all the facts, that the judge intends the suspension to be permanent, that is, to operate as a pardon or reprieve. The fact that the suspension is to a definite date may or may not indicate that the judge intends the suspension to operate in an unlawful manner; since by continuing the case from term to term, as petitioner says may lawfully be done, the statutory duty may be ignored indefinitely and permanently. Obviously the purpose and the purpose alone must characterize the validity of the court's action.

It follows that "indefinite" suspensions are not interdicted in the *Killits case* if indefiniteness of time alone is meant. In its broader sense "indefinite" suspension means permanent suspension without purpose other than that there shall be no sentence at any time. Such was the suspension held unlawful in the *Killits case*. Thus it may truly be said that a suspension for a definite and lawful purpose though indefinite in time is not indefinite in any sense which can offend the law. Accordingly, there is no reason why the presumption of validity which is applied, as the petitioner says correctly, in cases where the suspension is to a definite date should not apply to cases where the suspension is not to a definite date since a lawful purpose is to be presumed in all cases unless the contrary appears.

The petitioner cites *United States* v. *Wilson*, 46 Fed. 748 (C. C. D. Idaho); *Ex parte Singer*, 284 Fed.

60 (C. C. A. 3d); *Mintie* v. *Biddle*, 15 F. (2d) 931 (C. C. A. 8th), and certain State decisions (Br. p. 9) as authority for the proposition that the order of December 10, 1930, was "an indefinite or permanent" suspension of sentence. While expressions in certain of these cases lend support to petitioner's argument, we believe examination will disclose that in most of them the court—from all the facts before it, including the order itself—reached the conclusion that the suspension in question was intended to be "permanent" within the meaning of the *Killits case*. If such conclusion was warranted, the cases are not inconsistent with the argument of the respondent in the case at bar. If these cases, or any of them, hold that every suspension of sentence which is indefinite in point of time is void, we submit that they are inconsistent with *Ex parte United States* and, for reasons above stated, are erroneous.[14]

B. THE SUSPENSION OF SENTENCE UNDER THE FEDERAL PROBATION ACT

Even if the suspension of sentence was invalid under *Ex parte United States*, we contend that it was valid under the subsequently enacted Federal Probation Act, which appears in the appendix to peti-

[14] We can not accept the holding in the opinion of the court below, based, erroneously we think, upon the *Killits case*, that the order of December 10, 1930, was void. (R. 7.) The decision of that court is nevertheless correct for reasons set forth under Point II, pp. 26–37, *infra*.

tioner's brief. That Act gives to the United States District Courts the power

> *to suspend the imposition or execution of sentence* and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best. * * * (Italics ours.)

Although the statute expressly gives the trial court power to suspend the imposition of sentence, the petitioner contends that the suspension here was invalid because the judge did not purport to act under the statute, i. e., because, after suspending sentence, the judge did not place the defendant upon probation for a fixed period and upon specified conditions as, it is asserted, is contemplated by the statute.

The first answer to this contention is that it does not affirmatively appear from the record that petitioner was not placed upon probation. While, concededly, it does not appear that he was, it does not appear *that he was not.* Nor is it alleged in the petition for a writ of *habeas corpus* that he was not placed upon probation. It is fairly to be presumed, in the absence of any showing to the contrary, that upon the suspension of sentence the petitioner was placed upon probation, discharged from the custody of the Marshal, and told by the judge that he was on his good behavior, but that a complete minute of the order was not entered by the clerk upon the court records. If these were the facts, the action of the trial judge was, concededly, within the powers con-

ferred by the statute.[15] Keeping in mind that this proceeding was for a writ of *habeas corpus* to discharge the petitioner from custody under a commitment, valid upon its face, of a court having jurisdiction upon a plea of guilty to an indictment the validity of which is not questioned, and that such proceedings import and are supported by every presumption of validity, we submit that, in the absence of an affirmative showing by petitioner that he was not placed upon probation, this Court should presume the facts to be such as would make the order of suspension valid rather than invalid. (*United States* v. *Pridgeon*, 153 U. S. 48, 59, 62–63, *supra*, and cases at pp. 14–16, *supra*.)

Even if no presumption be indulged, we contend that the order was valid under the Probation Act. By Section 1 of the Act the court is expressly given the power "to suspend the imposition * * * of sentence," and by Section 2 the court is given power to revoke "the suspension of sentence" at any time "within the maximum period for which the defendant might originally have been sentenced" even though "the probation period" has expired. Thus in certain

[15] Where it appears that the defendant is placed upon probation pursuant to conditions orally stated by the judge, it is immaterial that these conditions do not appear in the formal order suspending the sentence. *United States* v. *Mulligan*, 48 F. (2d) 93, 94 (C. C. A. 2d); *Commonwealth* v. *McGovern*, 183 Mass. 238; *People* v. *Trombly*, 173 App. Div. 497. The trial court possesses the power at any time to correct its records to show that probation was granted. *United States ex rel. Campbell* v. *Bishop*, 47 F. (2d) 95, 96 (C. C. A. 5th) *supra*; *Campbell* v. *Aderhold*, 36 F. (2d) 366, 367 (N. D. Ga.).

cases there may be a suspension of sentence under the Probation Act which is not necessarily connected with a formal probation. Accordingly, in view of the wide discretion necessarily vested in the trial court in the administration of the statute (*Burns* v. *United States*, No. 378, present term, decided Dec. 5, 1932), we think that any suspension of sentence must be upheld under the statute unless it appears affirmatively that the suspension violates some express provision of the Act or is clearly for a purpose inconsistent with the known objects of the Act.

Almost the precise situation here presented was presented in *Ex parte DeAngelo*, 50 F. (2d) 847 (C. C. A. 6th). It was there held that the trial judge, who deferred sentence without designation of a specific time for sentence, could, at a subsequent term, eliminate the suspension and sentence the defendant. The court said (p. 848):

> Granted that in the instant case the sentencing judge did not specifically indicate that the postponement of sentence was a suspension of its imposition under the Probation Law. We are dealing with the question of judicial power. If what the court did, by whatever name it may be called, operated as a suspension of the imposition of sentence, it was clearly within the power of the court to do it. * * *[16]

[16] An apparent intimation to the contrary in *Hodges* v. *United States*, 35 F. (2d) 594, 595 (C. C. A. 10th), is, we submit, based upon a construction of the Federal Probation Act which is opposed to its interpretation by this Court in *Burns* v. *United States*, *supra*.

Apparently the same view of the statute was taken in *Campbell* v. *Aderhold*, 36 F. (2d) 366, 367 (N. D. Ga.), *supra*. See also *Finer* v. *Commonwealth*, 250 Mass. 493; *Commonwealth* v. *McGovern*, 183 Mass. 238, *supra*. Cf. *People* v. *Penn*, 302 Ill. 488, 496, *supra*.

Even if an order suspending sentence under the Probation Act should properly contain a reference to a stated period and terms of probation, no difficulty arises from the fact that in the case at bar the order merely suspended sentence. Cases have arisen under the Federal Probation Act and State Probation Acts similar to the Federal statute, where the order of the court merely suspended the sentence and placed the defendant upon probation without specifying any period of probation or terms thereof. As to such a situation the court in *Campbell* v. *Aderhold*, 36 F. (2d) 366, 367, *supra*, said:

> If there is a general probation granted and an omission to fix at the time, verbally or in the judgment, the terms and conditions of probation, these can be added or altered at any time to save the probation from failure. * * *

So far as the period of probation in such cases is concerned, some courts have held that the statute itself operates to fix the period as the maximum period for which probation might have been granted. *People* v. *Patton*, 221 N. Y. 409, 411–414; *Richardson* v. *Commonwealth*, 131 Va. 802, 813; *People* v. *Page*, 125 Misc. Rep. 538, 541.

Obviously the omission is purely formal unless a permanent suspension was intended. If the de-

fendant was in any way prejudiced by the form of his suspension of sentence he should have asked for a resettlement of the order and should not now be heard to question its validity in *habeas corpus* proceedings after it has been revoked and sentence has been imposed. (See footnote 20, p. 30, *infra*.)

From the cases cited it would seem to follow that when a United States District Judge suspends sentence for an indefinite period and nothing appears as to the purpose of the suspension, the effect of the statute is automatically to place the defendant upon probation for such time, not exceeding the statutory limitation of five years,[17] as the court shall remain satisfied that the ends of justice and the best interests of the public and of the defendant are being subserved thereby. Such a conclusion has in substance been reached with respect to the Pennsylvania Probation Act, which is closely similar to the Federal Act. *Commonwealth ex rel. Wilhelm* v. *Morgan*, 278 Pa. 395. In that case the court said (p. 398):

> In our opinion every suspension of sentence since the effective date of the Act of 1911 is subject to its provisions, without regard to the form of the order.

See also *In re Giannini*, 18 Cal. App. 166.

This conclusion is wholly consistent with and, we think, is suggested if not required by the interpretation of the scope and purpose of the Federal Proba-

[17] In the instant case this period is coterminous with the maximum period of imprisonment to which petitioner could have been sentenced for the offense of which he was convicted. See footnote 1, p. 3, *supra*.

tion Act recently enunciated by this Court. In *Burns* v. *United States*, No. 378, present term, decided Dec. 5, 1932, *supra*, this Court said:

> The Federal Probation Act * * * confers an authority commensurate with its object. * * * Probation is thus conferred as a privilege and can not be demanded as a right. It is a matter of favor, not of contract. There is no requirement that it must be granted on a specified showing. The defendant stands convicted; he faces punishment and can not insist on terms or strike a bargain. To accomplish the purpose of the statute, an exceptional degree of flexibility in administration is essential. It is necessary to individualize each case, to give that careful humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion. The provisions of the Act are adapted to this end. * * *

With respect to the absence of limitations upon the grant and revocation of probation the Court said:

> No criteria for modification or revocation are suggested which are in addition to, or different from, those which pertain to the original grant. The question in both cases is whether the court is satisfied that its action will subserve the ends of justice and the best interests of both the public and the defendant. The only limitation, and this applies to both the grant and any modification of it, is that

> the total period of probation shall not exceed five years. * * *

Although sentence has been suspended, the defendant—

> is still a person convicted of an offense, and the *suspension of his sentence remains within the control of the court.* * * * (Italics ours.)

The opinion in the *Burns case* makes it clear that upon conviction the defendant "faces punishment and can not insist upon terms or strike a bargain"; that in the matter of revoking probation the court is not limited by the terms and conditions upon which probation may have been granted, and that regardless of such terms it may revoke a probation, as it may grant it, whenever satisfied that the ends of justice will be subserved. Accordingly, we submit that even if the trial judge when suspending sentence did not formally state that he was placing the petitioner upon probation the suspension was nevertheless valid as a proper exercise of the judge's power under the statute.

It follows that the order of December 10, 1930, was a valid order. If the sentence was suspended only temporarily for a purpose incident to the imposition of the sentence, it was valid wholly apart from any statute. If the suspension be regarded as permanent, then it must be held to have been made under and to be limited by the Federal Probation Act. Since the validity of the judgment of June 17, 1931, and, there-

fore, of the commitment under which petitioner is held by the respondent, follows necessarily from either of these conclusions, this Court, we submit, should not presume a state of facts, *not affirmatively shown to have existed*, inconsistent with both of such conclusions.

II

EVEN IF THE ORDER SUSPENDING THE IMPOSITION OF SENTENCE WAS VOID, SENTENCE WAS LAWFULLY IMPOSED AT A SUBSEQUENT TERM

The petitioner contends that if the order of December 10, 1930, was invalid, which we now assume, the trial court upon the expiration of the term lost jurisdiction thereafter to sentence him. Concededly, *United States* v. *Wilson*, 46 F. (2d) 748 (C.C.D. Idaho); *Ex parte Singer*, 284 Fed. 60 (C. C. A. 3d); *Mintie* v. *Biddle*, 15 F. (2d) 931 (C. C. A. 8th), all hereinbefore cited, and certain State cases (Pet. Br. 15) support this contention. These decisions, we submit, are erroneous. They are all apparently based upon the theory that an indefinite, permanent suspension of sentence operates, upon the expiration of the term, as an abandonment of the prosecution and a discharge of the defendant. No adequate reason for this extraordinary result may, we believe, be found in any of the cases cited. Both logically and historically such result is indefensible. The correct view is, we submit, that of those cases which hold, as did the court below, that an invalid suspension of the *impo-*

sition [18] or execution [19] of a sentence does not deprive the court of jurisdiction at a later term to impose or enforce the sentence. Cf. *Ex parte De Angelo*, 50 F. (2d) 847, 848 (C. C. A. 6th), *supra*.

The petitioner regards as inapplicable to the case at bar those cases above cited which permit the trial court *after the term* to revoke an invalid order suspending the *execution* of sentence. But no adequate reason has been suggested, and we believe none exists, why the basis of such decisions is not fully applicable to the case where *imposition* of sentence has been unlawfully suspended. The ground of such

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[18] *Hancock* v. *Rogers*, 140 Ga. 688; *Ex parte Dunn*, 50 S. D. 48, 52–53; *Hoggett* v. *State*, 101 Miss. 269. See also *Campbell* v. *Aderhold*, 36 F. (2d) 366, *supra*, and cf. *Taylor* v. *Walker*, 6 F. (2d) 577 (C. C. A. 4th, *supra*). These cases refute the statement of petitioner (Br. pp. 11, 14) that those courts which follow the *Killits case* are "uniform" in holding that the trial court loses jurisdiction after the term to impose a sentence which has been invalidly suspended. Of course, those courts which do not follow the *Killits case* recognize the power of the trial court to impose sentence at a later term. *People* v. *Court of Sessions*, 141 N. Y. 288; *Ex parte St. Hilaire*, 101 Me. 522; *Commonwealth* v. *Dowdican's Bail*, 115 Mass. 133; *Philppot* v. *State*, 65 N. H. 250; *Ex parte Williams*, 26 Fla. 310; see also *State* v. *Drew*, 75 N. H. 402.

[19] *Morgan* v. *Adams*, 226 Fed. 719, 721 (C. C. A. 8th); *United States ex rel Campbell* v. *Bishop*, 47 F. (2d) 95, 96 (C. C. A. 5th); *Tanner* v. *Wiggins*, 54 Fla. 203; *Reese* v. *Olsen* 44 Utah 318; *Spencer* v. *State*, 125 Tenn. 64; *Fuller* v. *State*, 100 Miss. 811; *Miller* v. *Evans*, 115 Iowa, 101; *Brabandt* v. *Commonwealth*, 157 Ky. 130; *Neal* v. *State*, 104 Ga. 509; *State* v. *Abbott*, 87 S. C. 466.

decisions (see footnote 19, p. 28, *supra*) is that if the order suspending the execution of sentence is illegal, it is so because it is beyond the power of the court, and therefore void; but the sentence is valid, and, being separable from the void order of suspension, is enforceable by the court at any time, either within or after the term. And so in the instant case, if the order of suspension was invalid, nevertheless the *conviction* was authorized and valid, and no reason appears why the trial court should not have power to impose the statutory penalty after the term.

This conclusion is supported, and indeed, we think, required by principles frequently announced and applied by this Court. In the *Killits case* the Court held "that the right to relieve from the punishment, fixed by law and ascertained according to the methods by it provided, belongs to the executive department," and that, in the absence of a statute providing otherwise, the courts of the United States upon the conviction of a defendant have no discretion but to impose the punishment provided by law. The same principle was recently reaffirmed in *Sorrells* v. *United States*, No. 177, present term, decided December 19, 1932, and in *Ex parte United States*, No. 19, Original, present term, decided December 5, 1932. Accordingly after a verdict or plea of guilty the judge is under a duty to impose sentence and enforce the statutory penalty. He may suspend the imposition of sentence temporarily for a purpose incident to the imposition thereof, or he may suspend it for a definite period or

indefinitely under the Federal Probation Act. But failing to do either of these things, which the petitioner contends is the situation in the instant case, the duty remains, as petitioner himself vigorously contends (Br. pp. 24, 25, 28), to impose the sentence. If he fails to perform that duty he may be compelled, under the rule of the *Killits* and other cases, to do so by mandamus. *Rachmil* v. *United States*, 288 Fed. 782, 785 (C. C. A. 2d), certiorari denied, 262 U. S. 751; *Turner* v. *Commonwealth*, 209 Ky. 272, 275; *State* v. *Shea*, 95 Mo. 85, 90–91. See also *Ex Parte United States*, No. 19, Original, present term, *supra*. It necessarily follows that the judge may voluntarily do what he might be compelled to do by mandamus.

The foregoing makes clear, we think, the necessary inconsistency in and the circuitous path of the argument of the petitioner. He argues first that an indefinite, permanent suspension of sentence is invalid because it is tantamount to a refusal on the part of the judge to enforce the law; and in discussing the Federal Probation Act, he states that a United States District Court has no more power now than it had before that Act "to refuse to enforce the law." Then, swiftly forgetting his apparent desire that the judge should not be permitted to refuse to impose the statutory penalty, he contends that after the expiration of the term in which the invalid order was made the judge has lost his power to impose the sentence which he should have imposed, because he refused to

impose it when he should have done so.[20] Thus, either by innocent mistake or wilful error (i. e., in attempting to suspend the sentence in a manner beyond his power), he is permitted, under petitioner's argument, to accomplish indirectly that which he is wholly without authority to do directly. This point is well stated in *Ex parte Dunn*, 50 S. D. 48, *supra*, where the court, rejecting the view of the cases relied upon by the petitioner, said (pp. 52–53):

> * * * the weakness of that view seems apparent. It amounts to saying that the court may not infringe upon the prerogative of the Governor by attempting to pardon one convicted of crime, but, if a court postpones pronouncing of judgment in such manner as to be equivalent to a pardon, the court loses jurisdiction to sentence, and the defendant must go free; thus allowing the court to accomplish by mere error what it is denied the power to do by direct act.

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[20] It should be borne in mind that the petitioner made no objection, so far as the record discloses, to the order suspending the imposition of sentence, and never took steps to have it set aside. After accepting the benefits of the suspension we submit he should not now be permitted to use the order of suspension as the basis for escaping all liability for the statutory penalty. *Finer* v. *Commonwealth*, 250 Mass. 493, 497, *supra; Hoggett* v. *State*, 101 Miss. 269, *supra; Dalton* v. *State*, 6 Okla. Cr. 368, *supra*. If he had a right to an immediate sentence he waived it by consenting to the suspension. *United States* v. *Mulligan*, 48 F. (2d) 93, 94 (C. C. A. 2d), *supra*. If he waives the delay in pronouncing sentence he may not contend that the court lost jurisdiction to pronounce sentence at a later term. *People* v. *Penn*, 302 Ill. 488, 495–496, *supra*.

No impediment to the result for which we contend arises from the fact that the sentence in the case at bar was imposed at a term subsequent to the one in which it was, so petitioner alleges, invalidly suspended. In *United States* v. *Mayer*, 235 U. S. 55, *supra*, it was held that upon the expiration of the term of court in which its *final* order or judgment was entered the trial court loses jurisdiction of the case, unless proceedings to set aside or alter such order or judgment are begun during that term. It logically follows, and the cases hold, that until a *final* order or judgment has been entered the trial court retains jurisdiction of the case, and the case is regarded as pending from term to term without any formal order of continuance. *Rachmil* v. *United States*, 288 Fed. 782, 785 (C. C. A. 2d), certiorari denied, 262 U. S. 751, *supra; Hammers* v. *United States*, 279 Fed. 265, 266 (C. C. A. 5th); *Taylor* v. *Walker*, 6 F. (2d) 57 (C. C. A. 4th), *supra; Commonwealth* v. *Dowdican's Bail*, 115 Mass. 133, 136, *supra; Neace* v. *Commonwealth*, 165 Ky. 739, 743; *Hoggett* v. *State*, 101 Miss. 269, *supra; Dilley* v. *Commonwealth*, 243 Ky. 464. Cf. *Goddard* v. *Ordway*, 101 U. S. 745, 751; *United States* v. *Bishop*, 39 F. (2d) 208, 209 (S. D. Fla.), aff'd, 47 F. (2d) 95 (C. C. A. 5th).

So far as Federal courts are concerned the above conclusion would seem necessarily to follow from Section 8 of the Judicial Code (U. S. C., Title 28, Sec. 12) which provides:

> When the trial or hearing of any cause, civil or criminal, in a district court has been

> commenced and is in progress before a jury or the court, it shall not be stayed or discontinued by the arrival of the time fixed by law for another session of said court; but the court may proceed therein and bring it to a conclusion in the same manner and with the same effect as if another stated term of the court had not intervened.

The effect of this provision has been expressly or impliedly recognized and applied by the Federal courts. *Kalmanson* v. *United States*, 282 Fed. 619, 620 (C. C. A. 2d); *Walker* v. *Moser*, 117 Fed. 230 (C. C. A. 8th); *G. Amsinck & Co.* v. *Springfield Grocer Co.*, 7 F. (2d) 855 (C. C. A. 8th). In the last cited case the court said (p. 858):

> If it was not a final judgment, then the case remained on the docket, and the court would have the power at the next term, in the exercise of its judicial discretion, to reopen the case for the purpose of receiving newly discovered evidence, or any other purpose consonant with justice and a correct decision, * * *.

In a criminal case the final order or judgment is the sentence. *People* v. *Bork*, 78 N. Y. 346. Accordingly, in such a case the prosecution is not complete and the court does not lose jurisdiction until the entry of a valid sentence. *Rachmil* v. *United States*, 288 Fed. 782, 785 (C. C. A. 2d), certiorari denied, 262 U. S. 751, *supra; Hammers* v. *United States*, 279 Fed. 265 (C. C. A. 5th), *supra*. In the latter case the court said (p. 266);

> The case is to be regarded as pending until it is finally disposed of by the imposition of a lawful sentence.

An order suspending the imposition of sentence is not the sentence, nor is it a final, appealable order. *United States* v. *Lecato*, 29 F. (2d) 694, 695 (C. C. A. 2d); *People* v. *Bork*, 78 N. Y. 346, 350, *supra; State* v. *Bougiorno*, 96 N. J. L. 318; *Symington* v. *State*, 133 Md. 452; *State* v. *Vaughan*, 71 Conn. 457. See also *Commonwealth* v. *Carver*, 224 Mass. 42; *Hill* v. *People*, 10 N. Y. 463. *A fortiori* an invalid order suspending the imposition of sentence is not a final order. If the order of December 10, 1930, suspending the imposition of sentence was void, then no *final* order was entered by the trial court until the sentence of June 17, 1931. Accordingly, under firmly established principles, sentence was imposed at a time when the court retained full jurisdiction of the case.

This conclusion is sustained by the decisions of this and other courts in closely analogous situations. It is well settled that where a defendant has been imprisoned pursuant to a sentence which for any reason is void, and he thereafter secures his release upon *habeas corpus*, the proper procedure for the court granting the writ is to remand the defendant to the court which imposed the void sentence in order that a valid sentence may be imposed. That the term of court in which the original judgment was rendered has expired does not defeat the jurisdiction of that court to impose a valid sentence. *In re Bonner*, 151 U. S. 242, 260–261; *Bryant* v. *United States*, 214 Fed. 51, 53–54 (C. C. A. 8th); *Rogers* v. *Desportes*, 268 Fed. 308 (C. C. A. 4th); *Hammers* v. *United States*, 279 Fed. 265, 266 (C. C. A. 5th), *supra; United States* v. *Mathues*, 9 F. (2d) 913, 194 (C. C. A. 3d); *Biddle* v.

Thiele, 11 F. (2d) 235, 237 (C. C. A. 8th); *State* v. *Reed*, 138 Minn. 465, 467. Cf. *Coleman* v. *Tennessee*, 97 U. S. 509, 519–520; *United States* v. *McBratney*, 104 U. S. 621, 624; *Medley, Petitioner*, 134 U. S. 160, 174; *Mahler* v. *Eby*, 264 U. S. 32, 46.

In *In re Bonner*, 151 U. S. 242, *supra*, the Court quoted with approval the following statement of the Supreme Court of Pennsylvania (p. 260):

> The common law embodies in itself sufficient reason and common sense to reject the monstrous doctrine that a prisoner, whose guilt is established, by a regular verdict, is to escape punishment altogether, because the court committed an error in passing the sentence. If this court sanctioned such a rule, it would fail to perform the chief duty for which it was established.

No reason is discernible why jurisdiction of the trial court should continue after the term in the case of a *void sentence* and not in the case of an *invalid suspension of sentence*.[21] Historically there is more basis for asserting the loss of jurisdiction in the *former* case since in such case the court has entered what purported to be its final order or judgment.

The result for which we contend follows all the more clearly in view of the Federal Probation Act. That statute expressly gave the trial judge power to

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[21] The petitioner argues that a defendant is entitled to at least a "modicum of consideration" and that it is unfair to hold the threat of imposition of sentence over a convict indefinitely. This difficulty is more fanciful than real since the defendant "may at any time insist upon the imposition of sentence." *United States* v. *Lecato*, 29 F. (2d) 694, 695 (C. C. A. 2d), *supra*.

suspend the imposition of sentence. If his order of December 10, 1930, was void under that statute it was void only because he failed to place the petitioner upon probation. To the extent that the order suspended the imposition of sentence, it was clearly authorized by the statute, and under well established principles the order to that extent should be sustained. *United States* v. *Pridgeon*, 153 U. S. 48, 62; *United States ex rel. Campbell* v. *Bishop*, 47 F. (2d) 95, 96 (C. C. A. 5th); *In re Giannini*, 18 Cal. App. 166, 169, all hereinbefore cited. If, after the term, the judge desires to make his order more definite or to add to it a grant of probation, there is nothing in the Probation Act to deter him. It is significant that at any time up to the beginning of the service of sentence it may be suspended under the Probation Act, even though the term has expired. *United States* v. *Levy*, 49 F. (2d) 811 (W. D. Wash.). Cf. *United States* v. *Murray*, 275 U. S. 347.

In the *Killits case* this Court was confronted with the argument that if it should fail to sustain the asserted right of Federal courts indefinitely and permanently to suspend sentence great hardship would result to many persons then at large upon suspended sentences. While conceding that this argument presented "a grave situation," the Court said (p. 52):

> But we are admonished that no authority exists to cure wrongs resulting from a violation of the Constitution in the past, however meritorious may have been the motive giving rise to it, by sanctioning a disregard of that instru-

> ment in the future. On the contrary, so far as wrong resulting from an attempt to do away with the consequences of the mistaken exercise of the power in the past is concerned, complete remedy may be afforded by the exertion of the pardoning power; * * *

These statements leave no room for doubt that in the opinion of this Court those Federal courts which, acting beyond their authority, had ordered sentences suspended, nevertheless retained jurisdiction regardless of the expiration of the term, to set aside their void orders and to impose the punishment provided by law.

CONCLUSION

The contentions of the petitioner are founded solely upon technical irregularities in the trial proceedings. We think that the Court should be slow to permit an admittedly guilty convict to escape the statutory penalty because of what in all likelihood was an inadvertence on the part of the clerk of the trial court.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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